

THE COURT'S LOCAL RULE ON MEDIATION

Rule 9019-1 ALTERNATIVE DISPUTE RESOLUTION - MEDIATION

(a) *Assignment Of Matters To Mediation*

The Court may order assignment of any matter to mediation upon its own motion, upon a motion by any party in interest or the U.S. Trustee, or upon a stipulated order submitted by the parties. Notwithstanding assignment of a case, proceeding or other matter to mediation, the parties shall remain responsible for complying with all pleading, discovery or other deadlines and any other applicable scheduling requirements in any court order, provision of the Code, Bankruptcy Rules or E.D.N.Y. Local Bankruptcy Rules, and the matter shall proceed on the court docket in the normal course for such a matter unless the Court orders otherwise.

(b) *Appointment of a Mediator*

The parties shall choose a mediator and at least one alternate from the Mediation Register of approved mediators kept by the Clerk. The parties' selection shall occur within ten days of entry of the order assigning the matter to mediation. Within ten days thereafter, the parties and the mediator (or the alternate, if the mediator fails to accept appointment) shall submit a consent order (i) appointing the mediator, and (ii) setting forth basic terms of the mediation, including, for example, the terms governing the mediator's compensation and expense reimbursement (hereafter referred to as the "Mediation Order"). Any terms of the mediation not set forth in the Mediation Order shall be governed by this Local Rule or, if not addressed herein, by the terms that may be set by agreement of the parties or, absent such agreement, by the mediator. If the parties cannot agree upon a mediator and an alternate within such time, or if the Judge deems selection by the Court to be appropriate, the Court shall appoint a mediator and alternate.

(c) *The Mediation Procedure*

- (i) After consultation with all attorneys and parties subject to the mediation, the mediator shall fix a reasonable time and place for the initial mediation conference and shall promptly give the attorneys and parties no less than fourteen days' advance written notice of the conference. The conference shall be held as soon after the entry of the Mediation Order as is practicable, but in no event later than thirty days after the entry of the Mediation Order. The mediator may require the parties to submit any materials the mediator directs to be prepared or assembled, including any relevant documents and/or a mediation statement, prior to the initial mediation conference.
- (ii) Each party that is an individual shall attend the mediation conference in person. All other non-governmental parties (*e.g.*, corporations, partnerships, limited liability companies) shall attend

in person through a representative who has complete authority and discretion to settle all disputed amounts and issues. To the extent a governmental party consents to participation in the mediation, it shall attend in person through a representative who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental party's position, and the procedures and policies under which the governmental party decides whether to accept proposed settlements. Notwithstanding the foregoing, the mediator may permit telephonic or video participation in appropriate circumstances.

- (iii) To ensure prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities, including private meetings between the mediator and parties and the submission of relevant documents, provided that a party may object to meeting with the mediator without counsel present. The mediator shall control all procedural aspects of the mediation not otherwise agreed to by the parties or set by the Court.
- (iv) The mediator shall have the authority to establish a deadline for the parties to act upon a proposed settlement or upon a settlement recommendation from the mediator.
- (v) Additional rules and procedures for the mediation may be negotiated and agreed upon by the mediator and the parties at any time during the mediation process.

(d) *Recommendations of the Mediator*

The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and the parties with a written settlement recommendation. Any such recommendation shall not be filed with the Court.

(e) *Parties' Failure To Comply With Mediation Rule*

In the event of any party's willful failure to attend or participate in the mediation process in good faith in accordance with this Local Rule, the mediator shall serve on the parties and file a report describing any such failure to attend or participate in the mediation process in good faith. The report (and any responsive papers thereto) shall be filed with the Clerk and state, in bold in the upper right hand corner of the front page, that it is being submitted to the attention of the Clerk assigned to mediation, who will take all appropriate steps to ensure that the papers are not sent to the Judge to whom the case is assigned. The Clerk shall deliver the report to the Judge designated by the Chief Judge for mediation, who will take such action as may be appropriate, including conducting a telephonic conference or scheduling a hearing and imposing sanctions.

(f) *Post-Mediation Procedures*

- (i) In the event that the parties reach an agreement as a result of the mediation, such agreement shall promptly be memorialized in writing and executed by the parties. Within five days of execution of such agreement, the parties shall provide the mediator with a copy of the executed agreement. Within 10 days following receipt of the executed agreement, the mediator shall serve upon the parties and file with the Clerk, with a copy to the chambers of the Judge assigned to the case, a report stating that the mediation has resulted in a settlement. The parties shall file either (a) the agreement, or (b) a motion seeking approval of the agreement, whichever is appropriate, with the Clerk within twenty days of the date the mediator's report is filed with the Court.
- (ii) In the event that the parties cannot reach an agreement as a result of the mediation, the mediator shall file a report with the Clerk, with a copy to the chambers of the Judge assigned to the case and the parties, so indicating.
- (iii) Upon the filing of a mediator's report pursuant to subparagraphs (i) or (ii) above, the mediation will be placed in suspense and the mediator will be excused from undertaking any further actions, unless otherwise requested by the parties or directed by the Court. The mediation will be deemed terminated and the mediator will be excused and relieved from further responsibilities in the matter upon approval by the Court of the settlement, or upon the mediator's application to be relieved.

(g) *Withdrawal from Mediation*

Any matter referred pursuant to this Local Rule may be withdrawn from mediation by the assigned Judge at any time upon determination for any reason that the matter is not suitable for mediation. Nothing in this Local Rule shall prohibit or prevent any party in interest, the U.S. Trustee or the mediator from requesting a conference with the Court or filing a motion seeking to withdraw a matter from mediation for cause.

(h) *Compensation of the Mediator*

The mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and shall be subject to Court approval if the estate is to be charged with such expense. The mediator and the parties shall include all terms relating to compensation in the Mediation Order. *See* subparagraph (b) of this Local Rule. Absent agreement or Court order to the contrary, the parties to the mediation shall pay equal shares of the mediator's compensation. In the event that the mediator and the parties cannot agree on the terms of compensation, the Court shall fix such terms as are reasonable and just. The mediator may, after notice to the parties, request to be relieved if unwilling to accept the Court's ruling or such terms.

(i) *Qualifications of the Mediator*

The Clerk shall establish and maintain a Mediation Register. Appointments to the Mediation Register shall be for three year terms, subject to renewal upon reapplication. To qualify for appointment to the Mediation Register, a person must (1) file an application in the form established by the Clerk, (2) not have been suspended from a professional organization, or have had a professional license revoked; not have pending any proceeding to suspend or revoke such license; not have resigned from any applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment, or professional license revocation was pending; and not been convicted of a felony, (3) not have been affiliated with or employed by the Court during the 36-month period preceding the date of such person's appointment to the Mediation Register, and (4) meet the following minimum qualifications:

- (i) *For Lawyers Applying to be a Mediator:* A person must (1) be, or have been, a member in good standing of the New York State bar for at least five years; (2) be admitted to practice in at least one of the District Courts in the Second Circuit; (3) have completed a mediation course or courses consisting of at least 12 hours of training; (4) be willing to undertake a minimum of three pro bono mediation assignments during the course of the three-year term; and (5) be certified by the Chief Judge. The Chief Judge may waive any of the foregoing requirements for good cause set forth in the application. Each person certified as a mediator shall take the oath or affirmation administered by the Chief Judge before serving as a mediator.
- (ii) *For Other Professionals Applying to be a Mediator:* A person must (1) be, or have been, authorized to practice for at least five years under the laws of the State of New York as a professional, including but not limited to, an accountant, real estate broker, appraiser, engineer or other professional occupation; (2) be an active member in good standing, or if retired, have been a member in good standing, of any applicable professional organization; (3) have completed a mediation course or courses consisting of at least 12 hours of training; (4) be willing to undertake a minimum of three pro bono mediation assignments during the course of the three-year term; and (5) be certified by the Chief Judge. The Chief Judge may waive any of the foregoing requirements for good cause set forth in the application. Each person certified as a mediator shall take the oath or affirmation administered by the Chief Judge before serving as a mediator.

(j) *Removal from the Mediation Register.*

A person may be removed from the Mediation Register either at the person's request or by the Chief Judge.

(k) *List of Mediators, Their Qualifications and Fees.*

The Clerk shall maintain, and make available to the public, a list of the persons on the Mediation Register, together with a brief biography supplied by each mediator and such information concerning the mediator's fee structure as the mediator provides to the Clerk. The Clerk shall also maintain for public inspection copies of the applications filed by applicants whose names appear on the Mediation Register.

(l) *Confidentiality*

Any oral or written statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation, or their agents, or by the mediator (other than to a Judge designated to hear a mediation dispute under Subparagraph (e) of this Local Rule, to the extent necessary to resolve any such dispute), including without limitation (i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (ii) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (iii) proposals made or views expressed by the mediator; (iv) statements or admissions made by a party in the course of the mediation; and (v) documents prepared for the purpose of, in the course of, or pursuant to the mediation. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court (except as required by Subparagraph (e) of this Local Rule). The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter, except any hearing held by the Court under Subparagraph (e) of this Local Rule. Unless the parties and the mediator agree or the Court orders otherwise, sixty days after the mediator files a report under subparagraph (f)(i) or (f)(ii) above, the mediator may destroy the submissions made by the parties and any other records of the substance of the mediation.

In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediation or other alternative dispute resolution procedure shall apply. Information otherwise discoverable or admissible in evidence, however, shall not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in mediation. These provisions shall not preclude a party, its counsel or the mediator from responding in confidence to appropriately conducted inquiries or surveys concerning the use of mediation generally.

The disclosure by a party of privileged information to the mediator or another party during the mediation process shall not constitute a waiver or otherwise adversely affect the privileged nature of the information.

(m) *Immunity*

The mediator shall be immune from claims arising out of acts or omissions incident to his or her service as a Court appointee.